IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 16TH JANUARY 2007 / 26TH PAUSHA 1928

CMA.No. 184 of 2002()

AS.57/1996 of SUB COURT,NEYYATTINKARA
OS.233/1994 of I ADDL.MUNSIFF'S COURT, NEYYATTINKARA

APPELLANT: 4TH RESPONDENT/5TH DEFENDANT:

C. SEETHAMMA, D/O. CHELLAMMA PILLA,
ARATHY PUTHEN VEEDU, HOSPITAL JUNCTION,
PARASSALA VILLAGE, PARASSALA P.O.

BY ADV. SRI.G.S.REGHUNATH

RESPONDENTS: APPELLANTS & RESPONDENTS 1 TO 3 & 5 TO 12:

1. C. RAJAMMA PILLA, W/O. KUMARA PILLAI,
KUMARAVILASOM, KOZHIYANVILA, PUNNAMOODU,
PALLICHAL VILLAGE, PALLICHAL P.O.,
NEYYATTINKARA TALUK.

2. C. GOMATHY AMMA, D/O. CHELLAMMA PILLA,
A.K. NIVAS, T.C.XI/2055, KANAKA NAGAR,
VELLAYAMBALAM, KOWDIAR P.O.,
TRIVANDRUM TALUK DO DISTRICT.

3. C. KAMALAKSHI AMMA, ALIAS KAMALAMMA,
D/O. CHELLAMMA PILLA, KANAPARAMBIL HOUSE,
SOUTH OF VELLAKINAR, PUTHENANGADI WARD,
ALAPPUZHA.

4. C. THANKAMMA PILLAI, D/O. CHELLAMMA,
T.C.28/366, THUNDUVILA VEEDU,
KAITHAMUKKU P.O., TRIVANDRUM DISTRICT.

5. S. JEEVA, D/O. SEETHAMMA, INCOME TAX
QUARTERS NO.57, PANAMPALLY NAGAR,
ERNAKULAM.

6. PARTHASARATHY, S/O. LATE KRISHNA PILLAI,
ARATHY PUTHEN VEEDU,
HOSPITAL JUNCTION, PARASSALA P.O.,
NEYYATTINKARA TALUK.

7. MANON MANI, W/O. LATE NATARAJA PILLAI, DO. DO.

8. N. KRISHNA KUMAR, S/O. LATE NATARAJA PILLAI, DO. DO.

9. M. SINDHU, D/O. LATE NATARAJ PILLAI,
ARATHY PUTHEN VEEDU, HOSPITAL JUNCTION, DO. DO.

10. M. SMITHA, D/O. LATE NATARAJ PILLAI, DO. DO.

11. M. PREMAKUMAR, S/O. LATE MADHAVAN PILLAI, DO. DO.

12. VASANTHAKUMARI, D/O. LATE MADHAVAN PILLAI, DO. DO.

R1 BY ADV. SRI.B.KRISHNA MANI
SRI.V.PREMCHAND

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 16/1/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.M.P.NO.5399/2002 IN C.M.A.NO.184/2002

DISMISSED

16/1/2007 SD/- K.T.SANKARAN, JUDGE

//TRUE COPY//

ahz/

K.T. SANKARAN, J.

C.M.A.NO. 184 OF 2002

Dated this the 16th day of January,2007

JUDGMENT

The fifth defendant in O.S.No.233 of 1994, on the file of the I Additional Munsiff's Court, Neyyattinkara, who was the fourth respondent in A.S.No.57 of 1996, on the file of the Sub Court, Neyyattinkara, challenges the order of remand made by the lower Appellate Court.

2. The suit was filed by the first respondent in this appeal for partition claiming one-fifth share in the plaint B schedule property. The plaintiff, defendants 2 to 5 and 7 are the children of Krishna Pillai and the first defendant Chellamma Pillai. The sixth defendant is the daughter of fifth defendant. Defendants 8 to 11 are the widow and children of Nataraja Pillai, brother of the plaintiff and defendants 2 to 5 and 7. Defendants 12 and 13 are the children of Madhavan Pillai, another brother of plaintiff and defendants 2 to 5 and 7.

3. The case of the plaintiff is that the plaint A schedule property, having an extent of 37.5 cents, belonged to Krishna Pillai. Plaint B schedule property, having an extent of 6.250 cents, is portion of the plaint A schedule property. On 28.8.1974, Krishna Pillai executed Ext.A1 Will bequeathing plaint A schedule property to the plaintiff and defendants 2 to 7, late Nataraja Pillai and Madhavan Pillai, as per schedules A to I of Ext.A1 Will. Life interest was created in favour of the first defendant with respect to plaint A schedule property and the buildings. Plaint B schedule property with the `thaiveedu' therein was allotted to the plaintiff and defendants 2 to 5 as per schedules D,E,F,G and H in Ext.A1 Will. Krishna Pillai died and it is contended that the plaintiff and defendants 1 to 5 are in joint possession of the plaint B schedule properties. D schedule in Ext.A1 Will is the property allotted to the plaintiff, the extent of the property being three cents which takes in 1.750 cents with a shop building in the plaint A schedule and 1.250 cents with 1/5 portion of the building comprised

in plaint B schedule. The plaintiff and the first defendant sold the aforesaid 1.750 cents to the seventh defendant. The plaintiff claims partition of the 1/5 share of the plaint B schedule and the `thaiveedu' therein.

4. Defendants 1 and 5 filed a joint written statement contending, inter alia, as follows: Plaint A schedule belonged to Krishna Pillai, but the `thaiveedu' was not constructed by him. 8 cents of land including plaint B schedule property and the building thereon were mortgaged by Krishna Pillai in favour of Madhavan Pillai and his wife Pichu Amma, as per Ext.B8 Ottikuzhikanam deed of the year 1106 M.E. Pichu Amma is the sister of Krishna Pillai and Madhavan Pillai is his brother-in-law. Pichu Amma died and her rights devolved on her husband Madhavan Pillai. Madhavan Pillai constructed a `thaiveedu' on the side of the `vadakkathu kettidam'. Madhavan Pillai executed Ext.B1 Will dated 8.10.1120 M.E. in favour of the first defendant. The first defendant executed Ext.B2

settlement deed dated 16.2.1979 in favour of defendants 3 and 5 for an extent of 2 cents and 6 cents respectively. In the `thaiveedu', the fifth defendant is residing with family. Ext.B8 mortgage was not redeemed and by efflux of time it has become irredeemable. It was further contended that Ext.A1 Will has no effect in respect of eight cents of land covered by Ext.B8 mortgage, Ext.B1 Will and Ext.B2 settlement deed. The contesting defendants contended that the plaintiff has no right to claim partition and she has no partible interest in the property.

5. Before the trial court, a Commissioner was appointed, who inspected the property and filed Ext.C1 report and Ext.C1(a) plan. In the plan submitted by the Commissioner, he has located the plaint A schedule property, B schedule property and the eight cents of land. Going by the plan, the eight cents of land takes in plaint B schedule as well. Objections were raised by both parties to the Commissioner's report. In the objections filed by the plaintiff, she raised a

contention that the Commissioner has not properly identified the plaint B schedule property and that Ext.B8 property is far away from the plaint B schedule property. The Commissioner was examined as PW1. None of the parties adduced any oral evidence. The only witness examined on the side of the defendants is the attester of Ext.B1 Will.

6. The trial court raised the following issues:

"1. Is the suit maintainable?

2. Is the plaint schedule description correct"

3. Whether the schedule properties are partible, if so, what is the quantum of share entitled by plaintiff and 3rd defendant?

4. Reliefs and costs?"

Though issue No.2 is whether the plaint schedule description is correct and though the trial court found that issue in favour of the plaintiff, no finding was rendered by the trial court as to whether the plaint B schedule property forms part of Ext.B8 property and whether the Commissioner has correctly located Ext.A1

property and Ext.B8 property. Though the trial court stated that even after examination of the Commissioner as PW1, neither party could substantiate the contention that Exts.C1 and C1(a) are erroneous, that finding was rendered in the context as to whether the plaint description is correct or not and not in the context as to whether Ext.A1 property is part of Ext.B8 property. The discussions made by the trial court in paragraphs 12 to 15 of the judgment do not show that any proper consideration was made by the trial court to identify Exts.A1 and B8 properties and to arrive at a correct finding as to whether the plaint B schedule property forms part of Ext.B8 property and whether those properties have been correctly located and identified by the Commissioner in the plan and report. The trial court found that Ext.A1 Will is not proved in accordance with law, forgetting the fact that there was challenge as to the genuineness of Ext.A1 Will and that the execution of Ext.A1 Will is practically admitted by the contesting defendants. On the finding that Ext.A1 Will is not proved and that Ext.B1 Will was proved by

the defendants, the trial court held that the plaintiff has no partible interest.

7. On appeal by the plaintiff, the Appellate Court set aside the judgment and decree of the trial court and the suit was remanded to the trial court for fresh disposal. The Appellate Court held that the genuineness of Ext.A1 Will having been not disputed by the defendants, the trial court was not justified in holding that the said Will should have been proved by the plaintiff. The Appellate Court took note of the averments in the written statement filed by the fifth defendant wherein Ext.A1 Will is admitted.

8. The lower Appellate Court, to my mind rightly, observed that the crucial question that arises for consideration is whether the properties covered by Exts.B8, B1 and B2 take in the plaint B schedule property and `thaiveedu' therein. It was held by the Appellate Court that to decide this question, it is highly necessary to locate and identify the properties

covered by these documents on the basis of the description and boundaries shown therein. The lower Appellate Court held thus:

> ".. The lower court has not made any adjudication regarding the dispute between the parties with respect to the plaint B schedule property for the disposal of the case on merits. The lower court simply dismissed the suit holding that the appellant/plaintiff did not take any steps to prove her case that Ext.A1 will deed came into force immediately on the death of Krishna Pillai. The reason so assigned by the lower court is not a valid ground for dismissal of the suit for the reasons stated above. The claim for partition of plaint B schedule property put forward by the appellant/plaintiff on the strength of Ext.A1 will deed and the contention of the 4th respondent/5th defendant disputing the right of the appellant/plaintiff over plaint B schedule property and claiming exclusive right over plaint B schedule property on the strength of Exts.B8, B1 and B2 documents were not at all considered and determined by the lower court on merits on the basis of the available evidence. The lower court did not take any effort to consider the moot question as to: Whether the plaint B schedule property forms part of mortgage holding covered by Exts.B8, B1 and B2? In the above circumstances, it has become necessary to remand the suit to the lower court for disposal of the suit on merits. The lower court has to enter on definite finding regarding the question as to: Whether plaint B schedule property forms part of the mortgage holding covered by Exts.B8, B1 and B2 documents? It is true that the lower court has accepted Exts.C1 report and C1(a) plan. But the appellant/ plaintiff has filed objection to Exts.C1 and C1(a) stating that Exts.C1 and C1(a) do not give

> sufficient details and datas to identify the plaint B schedule property with reference to Ext.A1 partition deed and the mortgage holding covered by Exts.B8, B1 and B2 documents. Whether Exts.C1 and C1(a) can be accepted and acted upon to identify plaint B schedule property and the mortgage holding covered by Exts.B8, B1 and B2 are to be considered afresh by the lower court in the light of the objection to Exts.C1 and C1(a) filed by the appellant/plaintiff and in view of the available evidence in this case. In order to consider the same, the description and measurements of the properties and the boundaries shown in the documents relied on by the parties are also to be considered by the lower court. The lower court has to afford opportunity to both parties to let in further evidence, if they so desire, to vindicate their stand for the disposal of the case on merits..."

9. The learned counsel for the appellant/fifth defendant contended that Ext.B8 is of the year 1106 M.E. and that since that mortgage was not redeemed by the plaintiff or by any of the co-mortgagors, the plaintiff is not entitled to claim partition. He contended that the materials already on record would clearly indicate that the plaint B schedule property forms part of Ext.B8 property. It was contended that by efflux of time, the mortgage has become irredeemable and, therefore, the plaintiff cannot claim any right under Ext.A1, since Krishna Pillai could not have

conveyed any right as per Ext.A1 Will. The counsel also submitted that there was no case for the appellant that an opportunity to adduce evidence was not afforded by the trial court or that the evidence on record was not sufficient to decide the issues involved in the case.

10. The learned counsel for the first respondent/ plaintiff, on the other hand, contended that the trial court did not raise proper issues for trial. Though in the written statement filed by defendants 1 and 5 it was contended that Ext.B8 mortgage has become irredeemable, the trial court did not raise any issue on the question of limitation and, therefore, the plaintiff could not adduce any evidence to show that Ext.B8 mortgage subsists. In the absence of any issue having been raised by the trial court, the plaintiff was not expected to adduce any evidence, either documentary or oral, in respect of such a contention and the counsel submits that the plaintiff was highly prejudiced by not raising proper issues for trial. He

also submitted that the trial court did not consider the crucial question whether the plaint B schedule property forms part of Exts.B8, B1 and B2 documents and whether the Commissioner has identified the properties covered by Exts.B8, B1 and B2 with reference to the description and boundaries in those documents and with reference to the survey records. He pointed out that it has come out in the evidence of PW1 Commissioner that the survey records were not available and that he had measured the properties and prepared the plan with reference to the boundaries available on the spot and not with reference to the survey records.

11. Answering the submissions made by the counsel for the first respondent/plaintiff, learned counsel for the appellant submits that if it is the contention of the plaintiff that Ext.B8 mortgage subsists, the suit filed by the plaintiff for partition without redeeming the mortgage would not be maintainable. He pointed out that there is no prayer in the plaint for redemption of the mortgage.

12. It is submitted by both parties that the plaint schedule property is situated on the side of the National Highway and that it is a very valuable property. The trial court has not raised proper issues for trial. Though the remand is made by the Appellate Court not on that ground, I am of the view that in any view of the matter a remand is absolutely necessary for a proper, effective and complete disposal of all the issues involved in the suit. The crucial question to be decided is whether Ext.B8 property takes in the plaint B schedule. To resolve that dispute, identification of the property with reference to survey records and with reference to description and boundaries of Exts.B8, B1, B2 and A1 is absolutely necessary. Though the Commissioner had located the plaint B schedule property and also the eight cents of land, the report does not indicate whether he has inspected the property with reference to Exts.B8, B1, B2 and A1. It has come out in evidence that the Commissioner has not inspected the property

with reference to the survey records. In the nature of the dispute involved between the parties, it is highly necessary that the correct identity of the property be fixed with reference to the title deeds as well as with reference to the survey records, so that, after considering the evidence and materials, the court would be able to completely and effectually adjudicate and resolve the disputes between the parties. The trial court should have raised an issue as to whether the mortgage right under Ext.B8 subsists or whether it has become irredeemable. It is also necessary to decide the question whether the suit for partition filed by the plaintiff without redemption is maintainable. Both parties have not tendered any oral evidence before the trial court. In the nature of the dispute involved in the case, for a proper and effective disposal of the case, the oral evidence of the parties would also be relevant. I am of the view that an opportunity should be afforded to both parties to amend the pleadings and to adduce oral and documentary evidence. As directed by the lower Appellate Court, the trial court shall

decide the question whether the plaint B schedule property has been properly identified by the Commissioner and whether Exts.C1 and C1(a) are liable to be accepted and acted upon. If the trial court comes to the conclusion that a fresh investigation by the Commissioner is necessary, appropriate orders shall be issued to the Commissioner to complete the inspection of the property within a time frame. The trial court shall also raise necessary and proper issues for trial and dispose of the suit as expeditiously as possible.

13. The learned counsel for the appellant raised a contention that when the evidence on record is sufficient, the Appellate Court should not remand the case to the trial court in a casual manner. I am not inclined to accept that contention in the light of the facts mentioned above and the findings rendered above. It is clear from the judgment of the trial court that it had not considered the real questions involved in the suit. The Appellate Court also did not consider

the same on the ground that the trial court has not decided the question whether the plaint B schedule property forms part of Ext.B8 property. The Appellate Court desisted from deciding the question since the materials already on record were not sufficient to finally adjudicate upon the disputes involved in the case. I do not think that the Appellate Court was not justified in remanding the case to the trial court.

For the aforesaid reasons, I do not find any ground to interfere with the order of remand. No substantial question of law arises for consideration. With the observations in the preceding paragraphs, the remand is confirmed and the Civil Miscellaneous Appeal is dismissed. The parties shall appear before the trial court on 19.2.2007. Send back the records.

(K.T.SANKARAN)
Judge

ahz/

K.T.SANKARAN, J.

C.M.A.NO. 184 OF 2002

JUDGMENT

16th January, 2007